Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NICHOLAS KNAPP,

Petitioner,

v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICK TAYLOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals erred in ruling, contrary to the holdings of this Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Ninth Circuit Court of Appeals in *Mantolete v. Bolger,* 767 F.2d 1416 (9th Cir. 1985), and numerous other circuit and district courts, that even where a disabled person has established as a matter of fact that he is qualified to perform a program or activity under the Rehabilitation Act of 1973, as amended (29 U.S.C. §794 *et seq.*) ("the Rehabilitation Act"), the trial court should abdicate its role as the finder of fact on the issue of "otherwise qualified" and defer to the federal grantee's exclusion decision so long as that decision was not unreasonable?

2. Whether a person who is regarded by a federal grantee as having a permanent life-threatening cardiovascular condition, based upon that individual's record of impairment, including the implantation of an internal defibrillator in his abdomen, is "disabled" for purposes of seeking the protection of the Rehabilitation Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
I. Factual Background	3
II. Proceedings In The District Court	4
III. Proceedings In The Court Of Appeals	5
REASONS FOR GRANTING WRIT	7
THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S HOLDING IN *ARLINE* AND THE HOLDING OF OTHER CIRCUIT COURTS OF APPEAL, AND UNDERMINES THE PURPOSE OF THE REHABILITATION ACT BY REQUIRING THE TRIAL COURT TO ABDICATE ITS ROLE AS THE FINDER OF FACT AND TO DEFER TO THE FEDERAL GRANTEE'S DETERMINATION WITH RESPECT TO THE ISSUE OF WHETHER A DISABLED PERSON IS "OTHERWISE QUALIFIED" TO PERFORM AN ACTIVITY. THE DECISION ALSO IMPROPERLY NARROWS THE DEFINITION OF WHO IS "DISABLED"	7

I. INTRODUCTION 7

II. THE SEVENTH CIRCUIT'S HOLDING THAT THE TRIAL COURT SHOULD DEFER TO THE FEDERAL GRANTEE'S EXCLUSION DECISION SO LONG AS IT IS REASONABLY MADE AND BASED UPON COMPETENT MEDICAL EVIDENCE, EVEN WHEN THE DISABLED PERSON PROVES THAT HE IS "OTHERWISE QUALIFIED", CONFLICTS WITH THE STATUTORY LANGUAGE OF THE REHABILITATION ACT, AND THE DECISIONS OF THIS COURT AND OTHER CIRCUIT AND DISTRICT COURTS 8

A. The Seventh Circuit's Decision Conflicts With This Court's Decisions And Undermines The Purpose Of The Rehabilitation Act 8

B. The Seventh Circuit's Decision Conflicts With The Decisions Of Other Circuit And District Courts 12

C. The District Court Should Not Have To Defer To A Federal Grantee's Exclusion Decision Premised Upon The Opinions Of Private Physicians 14

D. The Seventh Circuit's Decision Will Have Serious Consequences With Respect To The Rights Of Disabled Persons 16

III. THE SEVENTH CIRCUIT'S HOLDING THAT KNAPP IS NOT DISABLED WILL DENY THE PROTECTION OF THE REHABILITATION ACT OF 1973 (AND OTHER ANTI-DISCRIMINATION ACTS) TO A BROAD RANGE OF PEOPLE WHO ARE EXCLUDED FROM PARTICIPATING IN FEDERALLY FUNDED ACTIVITIES BECAUSE THEY HAVE OR ARE REGARDED AS HAVING PERMANENT LIFE-THREATENING CONDITIONS 17

A. The Seventh Circuit's Decision Denies The Protection Of The Rehabilitation Act To A Person Whom A Federal Grantee Regards, Based Upon His Prior Record of Cardiac Arrest, As Having A Permanent Life-Threatening Cardiovascular Impairment That Could Cause Him To Cease All Life Functions At Any Time 17

B. Northwestern's Reliance Upon Knapp's Prior Cardiac Arrest, Hospitalization, And Implantation Of A Defibrillator, Required A Finding That Knapp Is "Disabled" Under This Court's Decision In *Arline* 21

C. The Petition Should Be Granted Because The Seventh Circuit's Decision Conflicts With Numerous Authorities And The Uncontradicted Evidence That Interscholastic And Intercollegiate Athletics May Constitute An Essential Element Of The Major Life Activity Of Learning 22

CONCLUSION 27

TABLE OF AUTHORITIES

CASES:	PAGE
Alexander v. Choate, 469 U.S. 287 (1985)	10
Brenden v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973)	23
Byrne v. Board of Education, School of West Allis-West Milwaukee, 979 F.2d 560 (7th Cir. 1992) .	22
Cape v. Tennessee Secondary Sch. Ath. Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976), rev'd on other grounds, 563 F.2d 793 (6th Cir. 1977)	23
Chalk v. United States District Court, 840 F.2d 701 (9th Cir. 1988)	12
Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991)	13
Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd, 865 F.2d 592 (3d Cir. 1989)	10, 14, 15
Doe v. New York University, 666 F.2d 761 (2d Cir. 1981)	13
E.E. Black v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980)	26
EEOC v. Kinney Shoe Corp., 917 F. Supp. 419 (W.D. Va. 1996), *aff'd*, 104 F.3d 683 (4th Cir. 1987)	14
Finley v. Cowles Business Media, 1994 U.S. Dist. LEXIS 8205 (S.D. N.Y. 1994)	20
Grube v. Bethlehem Area School District, 550 F. Supp. 418 (E.D. Pa. 1982)	14, 25
Homeyer v. Stanley Tulchin Associates, Inc., 91 F.3d 959 (7th Cir. 1996)	22, 26

Huber v. Howard County, Maryland, 849 F. Supp. 407 (D. Md. 1994), *aff'd per curiam*, 56 F.3d 61 (4th Cir. 1995) 26

Keller v. Western-Southern Life Ins. Co., 881 F. Supp. 1559 (M.D. Fla. 1995) 21

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) 11, 12, 13

Mendez v. Gearan, 1997 U.S. Dist. LEXIS 1594 (N.D. Cal. February 13, 1997) 10-11

Pahulu v. University of Kansas, 897 F. Supp. 1387 (D. Kan. 1995) 14, 25

Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D. N.J. 1980) 10, 14, 24

Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981) 13-14

Rizzo v. Learning Center, Inc., 84 F.3d 758 (5th Cir. 1996) 13

Sandison v. Michigan High School Athletic Ass'n, 863 F. Supp. 483 (E.D. Mich. 1994), *rev'd on other grounds and dismissed in part*, 64 F.3d 1026 (6th Cir. 1995) 22, 24

Scharff v. Frank, 791 F. Supp. 182 (S.D. Ohio 1991) 19

School Board of Nassau County v. Arline, 480 U.S. 273 (1987) 7, 9, 10, 14, 17, 21, 22

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 9, 10, 11

Wood v. Omaha Sch. Dist., 25 F.3d 667 (8th Cir. 1994) 13

Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981) 25

STATUTES AND REGULATIONS:

20 U.S.C. §§ 1681 *et seq.* 23
28 U.S.C. § 1254(1) 2
29 U.S.C. § 701(b) 10
29 U.S.C. § 706(8)(B) 3, 17, 21
29 U.S.C. § 794(a) 2, 8
42 U.S.C. § 12102(2) 21
42 U.S.C. § 12133(b) 13
29 C.F.R. §1630.(j), App. 20
34 C.F.R. § 104, App. A 21
34 C.F.R. § 104.47(a) 24
45 C.F.R. § 84.47(a) 24

OTHER AUTHORITIES:

Jones, "College Athletes: Illness or Injury and the Decision to Return to Play," 40 *Buff. L. Rev.* 113 (1992) 25

Mitten, "Sports Participation by 'Handicapped' Athletes," 10-SPG *Ent. & Sports Law* 15, 17 (1992) 26

"Recommendations for Determining Eligibility for Competition in Athletes with Cardiovascular Abnormalities" (26th Bethesda Conference) ... 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nicholas Knapp ("Knapp") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was entered on November 22, 1996 and is reported at 101 F.3d 473 (7th Cir. 1996). The opinion is reproduced in Appendix A ("App."). By order dated January 3, 1997, the Seventh Circuit denied plaintiff's petition for rehearing with suggestion for rehearing *en banc*. App. B.

The district court's decision granting plaintiff's motion for permanent injunction issued on September 9, 1997 is reported at 938 F. Supp. 508 (N.D. Ill. 1996) and is reprinted in Appendix C. The district court's decision denying defendants' motion for reconsideration, issued on September 25, 1996, was not published and is reprinted in Appendix D. The district court's September 26, 1996 Order and Judgment Granting Permanent Injunction was not published and is reprinted in Appendix E. On October 7, 1996, the district court issued a consolidated memorandum opinion and order which is reported at 942 F. Supp. 1191 (N.D. Ill. 1996) and is reprinted in Appendix F.[1]

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[1] Unless otherwise stated, Knapp will only refer to the district court's consolidated opinion and memorandum order. App. F.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals on which this Petition is based was entered on November 22, 1996. App. A. The plaintiff's petition for rehearing with suggestion for rehearing *en banc* was denied on January 3, 1997. App. B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794(a)), which provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706 (8)], shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 706(8)(B) defines a disabled individual as:

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

STATEMENT OF THE CASE

I. Factual Background

On September 19, 1994, while a senior in high school, Knapp suffered ventricular fibrillation, a life-threatening abnormal heart rhythm which can result in sudden death. He was resuscitated at that time by emergency medical technicians. Knapp, who was ranked number one in his class academically and considered to be one of the top basketball players in the State of Illinois, was hospitalized for approximately ten days, during which time his physicians implanted an automatic cardioverter defibrillator in his abdomen. Northwestern University, with knowledge of Knapp's condition, agreed to honor a prior oral commitment and signed him to a National Letter of Intent to attend Northwestern and to play intercollegiate basketball.

After Knapp enrolled at Northwestern for the 1995-96 academic year, the school's team physician, an orthopedic surgeon, declared Knapp permanently ineligible to play because of his conclusion that Knapp has as high as a 25 percent annual risk of a second cardiac event leading to sudden death regardless of whether he plays basketball and that playing basketball would substantially and unacceptably increase that risk for Knapp. Northwestern admits that it will not allow Knapp to play intercolle-

giate basketball for the school so long as he remains a student there.[2]

Since Knapp's cardiac arrest in 1994, cardiologists have been unable to find anything physically wrong with his heart. For more than two years now, like many persons who have had a cardiac event and received an implantable defibrillator, Knapp engages in high-intensity exercise: he plays competitive basketball, lifts weights and runs on a daily basis. He has not had one symptom of any cardiovascular problem. The intensity at which Knapp has played basketball during this time is no different than that which would be required of him to play on Northwestern's basketball team. Each of the highly respected cardiologists who has examined Knapp since his graduation from high school is of the opinion that it is appropriate for him to play intercollegiate basketball and that the risk of injury to him from participation would not be substantial.

II. Proceedings In The District Court

Knapp filed this complaint, subsequently amended, on November 7, 1995 against Northwestern and its Director of Athletics, Rick Taylor (collectively, "Northwestern"). In his First Amended Complaint, Knapp alleged that Northwestern's permanent exclusion of him from its basketball

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[2] Northwestern did not dispute either that it receives Federal financial assistance or that it is subject to the Rehabilitation Act. Knapp is in the process of completing his sophomore year at Northwestern. Under the applicable rules, he still has four more years of athletic eligibility.

program violates Section 504 of the Rehabilitation Act. Knapp sought injunctive relief and monetary damages.[3]

In September 1996, the district court held an evidentiary hearing on Knapp's request for a permanent injunction, which hearing related specifically to Knapp's medical condition as he began the 1996-97 academic year. Following that hearing, the district court denied Northwestern's motion for summary judgment and found that Knapp was "disabled" under the Rehabilitation Act. The district court further ruled that Knapp had proved, through various expert cardiologists, that he was "otherwise qualified" to participate in the activity of intercollegiate basketball. Based upon these findings, the district court enjoined Northwestern from continuing to exclude Knapp from its basketball team. 942 F. Supp. 1191 (N.D. Ill. 1996). App. C - F.

III. Proceedings In The Court of Appeals

After granting Northwestern's request to stay enforcement of the district court's injunction order and entering an expedited briefing schedule, the Seventh Circuit reversed the district court's decision on the grounds that Knapp is not "disabled" under the Rehabilitation Act, and that even if he were disabled, the district court com-

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[3] Knapp also alleged in a separate count that defendants' exclusion constituted a *de facto* expulsion of him from the National Collegiate Athletic Association and the Big Ten Conference in violation of his common law right under Illinois law to rudimentary due process. The district court granted defendants' motion to dismiss this additional claim on the ground that it failed to state a cause of action. The claim is not relevant to this Court's consideration of the instant Petition.

mitted reversible error when it weighed the conflicting testimony of the parties' medical witnesses concerning the nature of any increased risk to which Knapp would be exposed by playing basketball. Instead, according to the Seventh Circuit, the district court should not have acted as the finder of fact as to whether a disabled individual is otherwise qualified, but should have limited its role to determining merely whether the federal grantee, Northwestern, had acted reasonably based upon competent medical evidence, thereby deferring to Northwestern's decision to exclude Knapp. The Seventh Circuit remanded the case to the district court with instructions to enter summary judgment in Northwestern's favor. 101 F.3d 473 (7th Cir. 1996). App. A. Plaintiff's petition for rehearing with suggestion for rehearing *en banc* was denied on January 3, 1997. App. B.

REASONS FOR GRANTING WRIT

THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S HOLDING IN *ARLINE* AND THE HOLDING OF OTHER CIRCUIT COURTS OF APPEAL, AND UNDERMINES THE PURPOSE OF THE REHABILITATION ACT BY REQUIRING THE TRIAL COURT TO ABDICATE ITS ROLE AS THE FINDER OF FACT AND TO DEFER TO THE FEDERAL GRANTEE'S DETERMINATION WITH RESPECT TO THE ISSUE OF WHETHER A DISABLED PERSON IS "OTHERWISE QUALIFIED" TO PERFORM AN ACTIVITY. THE DECISION ALSO IMPROPERLY NARROWS THE DEFINITION OF WHO IS "DISABLED", DENYING THE APPLICATION OF THE REHABILITATION ACT TO THOSE PERSONS IT WAS ESTABLISHED TO PROTECT.

I. INTRODUCTION

The Seventh Circuit's holding that a trial court should not decide the question of whether a disabled person is "otherwise qualified", even when it finds that the individual is qualified to perform an activity, conflicts with the decisions of this Court and other circuit courts. This Court and other circuit courts have all held that the trial court, in applying the Rehabilitation Act, must make the ultimate determination whether a risk of injury allegedly posed by inclusion of a disabled person is "significant". This conflict mandates that the writ be granted and that this question, which goes to the foundation of the Rehabilitation Act (and similar anti-disability discrimination laws) be resolved.

The Court should also grant the writ because the Seventh Circuit's holding that Knapp is not "disabled" under the Rehabilitation Act, is inconsistent with the statutory language, the applicable regulations, and the decisions of this Court and other courts. Under the Seventh Circuit's analysis, a person is not entitled to seek the protection

of the Rehabilitation Act when the federal grantee regards the excluded individual as having a permanent life-threatening cardiovascular disease that creates an enormously high probability that the individual could have a cardiac arrest and die whether or not he participates in the activity from which he is excluded. Moreover, the Seventh Circuit's decision holds that this person is not covered by the Rehabilitation Act even when he is barred from participating in an activity which Congress, the courts, the trial court here, the federal grantee, and the excluded individual all deem to be an essential component of the major life activity of learning.

II. THE SEVENTH CIRCUIT'S HOLDING THAT THE TRIAL COURT SHOULD DEFER TO THE FEDERAL GRANTEE'S EXCLUSION DECISION SO LONG AS IT IS REASONABLY MADE AND BASED UPON COMPETENT MEDICAL EVIDENCE, EVEN WHEN THE DISABLED PERSON PROVES THAT HE IS "OTHERWISE QUALIFIED", CONFLICTS WITH THE STATUTORY LANGUAGE OF THE REHABILITATION ACT, AND THE DECISIONS OF THIS COURT AND OTHER CIRCUIT AND DISTRICT COURTS.

A. The Seventh Circuit's Decision Conflicts With This Court's Decisions And Undermines The Purpose Of The Rehabilitation Act.

Section 504(a) of the Rehabilitation Act (29 U.S.C. §794(a)) provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, *be excluded from the participation* . . . or be subjected to discrimination under any program or activity receiving Federal Financial assistance. . . ." (emphasis added). This Court has held that an otherwise qualified

person is one who is able to meet, with or without reasonable accommodation, all of a program's requirements in spite of his or her disability. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979); *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987).

No one disputes that Knapp has the skills today to play intercollegiate basketball. His "impairment" does not hinder his ability to perform any task required of an intercollegiate basketball player and he does not seek any special accommodation or preferential treatment. The question raised by this case is what role the trial court should play when there is conflicting evidence as to whether a disabled individual's participation in a program or activity creates a significant risk of substantial injury.

This Court provided the answer to this inquiry in *Arline*, which involved the right of a school board to terminate a teacher because of her susceptibility to tuberculosis, a contagious disease. In affirming the Eleventh Circuit Court of Appeal's decision, the Court provided meaningful protection to disabled persons from unwarranted discrimination by holding that it is the trial court's responsibility, not the responsibility of defendants who seek to exclude individuals with disabilities from participation, to make independent findings of fact as to the legitimacy of a grantee's concern of future risk and to determine specifically, "based on reasonable medical judgments": (1) The nature of the risk; (2) the duration of the risk; (3) the severity of the risk; and (4) the probability that the injury or harm will occur and the varying degrees of severity if it does occur. 480 U.S. at 288.

The Seventh Circuit has departed from the *Arline* standard by holding that the trial court's only inquiry should be whether the federal grantee's exclusion decision is reasonably made and based upon competent medical evidence, without regard to the validity of any conflicting evidence presented by the disabled individual. This new standard is little more than a method to explore the alleged discriminator's motive. However, this Court has already made clear that the federal grantee's intent in excluding the disabled person is irrelevant since good faith or lack of bad motive are not defenses to a claim under the Rehabilitation Act. *Alexander v. Choate*, 469 U.S. 287, 294-301 (1985). The question is not motive; it is, as stated in *Davis*, whether the disabled person can perform the activity at issue in spite of his alleged handicap. *See* 34 C.F.R § 104.3, App. A(5), at 36.[4]

In the short amount of time since *Knapp* was decided, the Seventh Circuit's new standard has already been attacked. As one district court observed (*Mendez v. Gearan*, 1997 U.S. Dist. LEXIS 1594 at 20 n. 9 (N.D. Cal. February 13, 1997):

> The Knapp decision would not have the Court make an independent determination of whether sub-

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[4] While this Court stated in *Arline*, 480 U.S. at 284-85, that one purpose of the Rehabilitation Act is to prohibit exclusion based upon reflexive or stereotypical judgments, it did not suggest that this was the Act's sole purpose. An equally important goal is inclusion and integration (29 U.S.C. § 701(b)) so as to allow disabled persons to live as fully as they are able (*Poole v. South Plainfield Board of Education*, 490 F. Supp. 948, 953-54 (D. N.J. 1980)) and to have an equal opportunity to participate in the activities offered by a federal grantee. *Davis v. Meese*, 692 F. Supp. 505, 520. (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

stantial risk and severity of injury is actually risked. *Knapp*, 101 F.3d at 484. Instead, Knapp holds that the "place of the court in such cases is to make sure that the decision-maker has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury, not to determine on its own which evidence it believes is persuasive." *Knapp*, 101 F.3d at 484. While an examination into the evidence relied upon by a decision-maker is important, a district court must also be permitted to determine whether "in light of [a plaintiff's] work history and medical history, employment of her would pose a reasonable probability of substantial harm." *Mantolete*, 767 F.2d at 1424.

> The Knapp Court would allow an individual to be excluded from a position solely on the basis of the risk of severe injury if the decision to exclude was supported by substantial evidence. *Such a standard violates the very purpose of the Rehabilitation Act: no individual should be excluded from a position when he/she can meet all of a program's requirements in spite of his/her disability. See Davis*, 442 U.S. at 406. *Consequently, if a decision-maker unnecessarily excludes an individual on the basis of a disability, that decision should be overturned, regardless of the sufficiency of the evidence upon which it was based.* A trier of fact, therefore, ought be permitted, under the Rehabilitation Act to determine if risk of injury caused by a disability is such that the individual has been needlessly excluded from participating in an activity. (emphasis added).

Thus, even though the district court here noted that Northwestern may have made a "rational decision that Knapp's risk is substantial based on reasonable evidence" (App. F-13), it correctly concluded that deference to the opinions of Northwestern's doctors (or expert wit-

nesses) was inappropriate. The district court's recognition that it was to decide the issue of the substantiality of the risk when presented with conflicting medical evidence is consistent with the plain language of Section 504, the regulations issued under it, and the decisions of this Court. The same cannot be said for the Seventh Circuit's decision and, for these reasons, the writ should be granted.

B. The Seventh Circuit's Decision Conflicts With The Decisions Of Other Circuit And District Courts.

Further justification for the granting of the Petition is found in the clear conflict that now exists between the Seventh Circuit's decision and the decisions of other circuit and district courts.

In *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985), the Ninth Circuit held, contrary to the Seventh Circuit:

> [A]lthough it is the employer who must make a substantial gathering of necessary facts, *the determination of whether the employer violated [the Rehabilitation Act] is to be made by the trial court de novo.* Therefore, a good faith or rational belief on behalf of the employer will not be a sufficient defense to an act of discrimination. (emphasis added).

767 F.2d at 1423. The Ninth Circuit then remanded that case to the district court "for a determination of whether, in light of [the plaintiff's] work history and medical history, employment of her would pose a reasonable probability of substantial harm." *Id.* at 1424. *See Chalk v. United States District Court*, 840 F.2d 701, 705 (9th Cir. 1988) (trial court's responsibility to conduct *de novo* assessment of the significance of the potential risk of

participation). The Seventh Circuit's decision conflicts with that of the Ninth Circuit on this issue.[5]

The Seventh Circuit's decision also conflicts with numerous decisions of other circuit and district courts which have held that the trial court's duty is to weigh the evidence and determine whether the risk is sufficient to justify exclusion. *See Doe v. New York University*, 666 F.2d 761, 779 (2d Cir. 1981); *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991);[6] *Wood v. Omaha Sch. Dist.*, 25 F.3d 667, 669 (8th Cir. 1994); *Pushkin v.*

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[5] The Seventh Circuit incorrectly suggests (App. A-16) that its decision is consistent with *Mantolete*. The Ninth Circuit did state (767 F.2d at 1422) that in determining whether there is sufficient risk to justify exclusion the "employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury." However, although the failure to conduct such an inquiry may provide evidence of a violation of the Rehabilitation Act, the Ninth Circuit ruled that the trial court is still required to make a *de novo* determination as to whether the risk to the disabled person from participation is substantial. The Seventh Circuit's decision departs from and ignores the essential component of the Ninth Circuit's holding.

[6] *See Rizzo v. Learning Center, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996), discussing the role of the trial court under the American with Disabilities Act (42 U.S.C. § 12133(b)), in assessing the "direct threat" posed to school children from a hearing impaired school bus driver:

> Whether one is a direct threat is a complicated, fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all of the evidence about the nature of the risk and the potential harm.

Regents of the University of Colorado, 658 F.2d 1372, 1390 (10th Cir. 1981).[7]

In contrast to the above cases, the Seventh Circuit's decision is without any meaningful support.[8]

C. The District Court Should Not Have To Defer To A Federal Grantee's Exclusion Decision Premised Upon The Opinions Of Private Physicians.

This Court in *Arline* stated that the trial court should normally defer to the reasonable medical judgment of independent public health officials when determining the risk of injury in a Section 504 claim. 480 U.S. 273, 288 n.18. However, it does not follow that the same deference

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[7] District Court decisions which are in conflict with the Seventh Circuit's decision include: *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948 (D. N.J. 1980); *Wright v. Columbia University*, 520 F. Supp. 789, 793 (E.D. Pa. 1981); *Grube v. Bethlehem Area School District*, 550 F. Supp. 418 (E.D.Pa. 1982); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989); *EEOC v. Kinney Shoe Corp.*, 917 F. Supp. 419 (W.D. Va. 1996) (determination under ADA of threat posed to plaintiff with epilepsy to be decided by trial court even where defendant employer claims it made an "individualized assessment" of plaintiff's condition), *aff'd*, 104 F.3d 683 (4th. Cir. 1997).

[8] The only case which supports the Seventh Circuit is *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995). In *Pahulu*, the district court addressed the issue of the risk to a student from further participation in intercollegiate football as a result of a spinal deformity. In one sentence, without citation, it held that all a grantee must show is that its decision was rationale and based upon competent medical evidence. This unsupported sentence should not form the foundation for an appellate court decision which overrules *Arline* and redefines the rights of disabled individuals under the Rehabilitation Act.

should be given to the opinions of a grantee's private medical witnesses.

Deference to the reasonable medical decisions of public health officials is sensible because these specially appointed medical officials have no bias in favor of any of the litigants and have a duty to make decisions and recommendations in the interest of protecting the health and safety of the general public. Their opinions on questions such as the dangers presented to the general public by contagious diseases may be necessary and persuasive. Here, however, public health officials had no role in the case since playing basketball creates a risk for no one other than Knapp.[9] *Cf. Davis v. Meese*, 692 F. Supp. 505, 520. (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) (neither opinions of private physicians of federal grantee

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[9] A district court may give weight to the general guidelines of a national conference of a group of private physicians like those promulgated by the participants of the 26th Bethesda Conference and set forth in a document entitled the "Recommendations for Determining Eligibility for Competition in Athletes with Cardiovascular Abnormalities." The district court here gave serious consideration to those general recommendations. This should not mean, however, as the Seventh Circuit now holds, that the trial court must defer to the recommendations of a private medical conference or private physicians upon which the grantee claims to rely, especially when the disabled person has proven through competent evidence that the activity does not create a substantial risk of injury to him. At trial, Knapp successfully exposed the lack of scientific data relied upon by the 26th Bethesda Conference participants for those recommendations which arguably applied to him and the overly restrictive attitudes upon which those recommendations were based. In addition, Knapp introduced significant medical evidence through other well-respected cardiologists which the trial court ultimately found to be more persuasive as it concerned Knapp's situation.

or disabled person entitled to preferential deference, and the role of the trial court is to weigh conflicting evidence to determine risk). If the Court deems the issue of the amount of "deference" to be given to private physicians to be an open one, it is a ripe question which should now be addressed in the face of the glaring conflict between the Seventh Circuit and the other circuits on this question.

D. The Seventh Circuit's Decision Will Have Serious Consequences With Respect To The Rights Of Disabled Persons.

The impact the Seventh Circuit's decision will have upon the rights of disabled individuals to seek redress against wrongful exclusion from activities for which they are qualified to perform in spite of their disability supports the granting of the writ. The Seventh Circuit states (App. A-20 to A-21) that it will now be the "rare case" involving the participation in athletics where a disabled person will be able to attack an exclusion decision. The Seventh Circuit, however, underestimates the consequences of its holding. Not only will it be the rare case where athletic participation is involved when an exclusion decision can be attacked, but also it will be the rare case that any disabled individual, in any context, will be able to prevail under the Rehabilitation Act. Stated differently, the Seventh Circuit has undermined the purpose of the Rehabilitation Act by creating, in essence, an irrebuttable presumption supporting exclusion which disabled persons will only be able to overcome in the most heinous of cases where bad intent is patent.

The Seventh Circuit's decision improperly favors the interests of the federal grantee over those of a disabled

person who is otherwise qualified, but is excluded solely on the basis of his perceived disability. The policy underlying the Rehabilitation Act mandates, as this Court in *Arline* and other circuit and district courts have held, that the disabled individual have the right to introduce at trial competent medical evidence that he or she is qualified to participate, and that it is for the trial court, not the federal grantee, to determine whether the level of risk is sufficient to justify exclusion. This important national issue of federal law requires that certiorari be granted.

III. THE SEVENTH CIRCUIT'S HOLDING THAT KNAPP IS NOT DISABLED WILL DENY THE PROTECTION OF THE REHABILITATION ACT OF 1973 (AND OTHER ANTI-DISCRIMINATION ACTS) TO A BROAD RANGE OF PEOPLE WHO ARE EXCLUDED FROM PARTICIPATING IN FEDERALLY FUNDED ACTIVITIES BECAUSE THEY HAVE OR ARE REGARDED AS HAVING PERMANENT LIFE-THREATENING CONDITIONS.

A. The Seventh Circuit's Decision Denies The Protection Of The Rehabilitation Act To A Person Whom A Federal Grantee Regards, Based Upon His Prior Record of Cardiac Arrest, As Having A Permanent Life-Threatening Cardiovascular Impairment That Could Cause Him To Cease All Life Functions At Any Time.

29 U.S.C. § 706(8)(B) defines a disabled individual as:

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

The absurdity of holding that someone like Knapp is not entitled to seek the protection of the Rehabilitation Act is revealed by the Seventh Circuit's recognition (App. A-8) of the all-encompassing impairment which Northwestern perceives him as having:

> The "disability" Knapp claims is the basis for discrimination against him is not a continuing one like blindness or deafness. At any given moment in time when Knapp's heart is functioning properly his disability does not affect him. He is truly disabled only when his heart stops, which may or may not happen to him again. The disability regarding which Northwestern allegedly discriminates, therefore, actually is the greater risk of harm for Knapp than the risk faced by other male college basketball players. *In addition, other impairments usually do not have as severe a result as is possible in this case.* A person who is deaf, for instance, will not suddenly die on the basketball court because of that disability. Here, Knapp's disability is all or nothing. Finally because Knapp's disability affects one of the most central organs of the body, his disability to some extent effects *all* major life activities—if his heart stops, he will not breathe, see, speak, walk, learn, or work. *Once again it is all or nothing—either his heart is functioning and no major life activities are limited at that moment, or it has stopped and the most major life activity of all—living—has been affected.* (emphasis added).

This evidence, which is present throughout the trial court record, should have resulted in the Seventh Circuit's affirmance, not the reversal, of the trial court's decision that Knapp is disabled and entitled to seek protection under the Rehabilitation Act.

According to Northwestern, someone with "idiopathic ventricular fibrillation" (the condition which Northwestern ascribes to Knapp and which indicates a heart that experienced ventricular fibrillation without identifiable cause) will always be at significantly greater risk to have a second event than the normal person. Northwestern claims that Knapp is like a walking time bomb who has as much as a 25 percent annual risk of a recurrent ventricular fibrillation. Most important, Northwestern's assessment of the level of Knapp's risk assumes he does not even play intercollegiate basketball. In other words, Northwestern perceives Knapp as having as much as 25 percent annual risk of having a second cardiac event if all he does is stay at home and watch television. Northwestern asserts that playing basketball would increase Knapp's risk of a second event.[10]

The fact that Knapp's implantable defibrillator (a type of prosthetic device) is designed to restore a ventricular

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[10] Knapp proved that Northwestern's perception of him as having as much as a 25 percent annual risk of having a second cardiac event was incorrect and that the very small risk of a second event while playing basketball is minimized by the presence of his implantable defibrillator. However, it is Northwestern's (incorrect) view of Knapp as someone who has a condition which causes him to have an incredibly high probability of having a second cardiac event and dying which renders him "disabled" and requires that he receive the protection of the Rehabilitation Act. *See Scharff v. Frank*, 791 F. Supp. 182, 184-85 (S.D. Ohio 1991) (employer's perception of plaintiff controlling with respect to issue of "substantial limitation"). Northwestern also has taken the position that no person with an implantable defibrillator should play intercollegiate basketball. This assertion goes solely to the issue of whether Knapp is "otherwise qualified" to play intercollegiate basketball, not to whether he is disabled.

fibrillation to normal rhythm (studies show a success rate of 99 percent) should not have precluded him from seeking relief under the Rehabilitation Act as a disabled person. 29 C.F.R. § 1630.2(j), App. at 339-40 ("The determination of whether an individual is [disabled] must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices"). Northwestern's exclusion decision, based in significant part on the fact that physicians determined that Knapp's condition required that he have a defibrillator implanted in his abdomen, renders Knapp the very disabled person the Rehabilitation Act is meant to cover.

Knapp's disability, as Northwestern perceives it, is like the disability of someone who has AIDS or is HIV positive—diseases which may not show outward indices of impairment, but are deemed to be "inherently substantially limiting." 29 C.F.R. §1630.2(j), App. at 339 ("Other impairments, however, such as HIV infection, are inherently substantially limiting"). Congress, which intended that the term "disability" under the Americans with Disabilities Act have the same meaning as the term "handicap" under the Rehabilitation Act, considered heart disease to be "inherently disabling." *See Finley v. Cowles Business Media*, 1994 U.S. Dist. LEXIS 8205, at 5-7 (S.D.N.Y. 1994).[11] The Seventh Circuit's decision, while explicitly recognizing the inherently disabling nature of Knapp's perceived physical impairment,

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[11] In that case, the court noted that the legislative history of the ADA indicates that Congress considered heart disease to be inherently disabling and that, as such, the plaintiff's chronic heart disease constituted an impairment "which rises to the level of a disability." *Finley*, 1994 U.S. Dist. LEXIS 8205, at 6-7.

ignores Congress' intent by its improper finding that Knapp is not "disabled" under the Rehabilitation Act.

B. Northwestern's Reliance Upon Knapp's Prior Cardiac Arrest, Hospitalization, And Implantation Of A Defibrillator, Required A Finding That Knapp Is "Disabled" Under This Court's Decision In *Arline*.

In coming to its perception of Knapp's current medical condition, Northwestern relied upon Knapp's prior medical record of his cardiac arrest, his hospital record, including the implantation of his defibrillator ("record of impairment") to justify his permanent exclusion from its basketball program. 29 U.S.C. § 706(8)(B)(ii).

In *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), this Court held that the hospitalization of the plaintiff for tuberculosis many years prior to her exclusion was more than sufficient to establish the substantial limitation of a life activity and that she was entitled to seek the protection of the Rehabilitation Act, without regard to her condition at the time of exclusion. Regulations promulgated under the Rehabilitation Act cite a record of heart disease as an example of a condition which establishes a "record of impairment" that substantially limits a major life activity. 34 C.F.R. § 104, App. A at 355. *See Keller v. Western-Southern Life Ins. Co.*, 881 F. Supp. 1559, 1561 (M.D. Fla. 1995) (plaintiff's cardiovascular condition constituted a "record of impairment" which rendered him "disabled" under the ADA (which has virtually an identical definition of "disability" (42 U.S.C. § 12102(2)) as the Rehabilitation Act).

In this case, Knapp, like the plaintiff in *Arline*, was hospitalized for a substantial period of time following his

ventricular fibrillation during which he had a defibrillator implanted in him. Furthermore, Knapp, like Arline, was excluded from a protected activity as a result of the federal grantee's perception of him, the source of which was Knapp's medical record. The Seventh Circuit, however, disregarded without explanation the *Arline* holding in concluding that Knapp is not "disabled."

C. The Petition Should Be Granted Because The Seventh Circuit's Decision Conflicts With Numerous Authorities And The Uncontradicted Evidence That Interscholastic And Intercollegiate Athletics May Constitute An Essential Element Of The Major Life Activity Of Learning.

Whether a person is "disabled" (*i.e.*, has an impairment which substantially limits a major life activity) is an individualized determination, to be decided on a case-by-case basis. *Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959, 962 (7th Cir. 1996); *Byrne v. Bd of Ed School of West Allis-West Milwaukee*, 979 F.2d 560, 565 (7th Cir. 1992); *Sandison v. Michigan High School Athletic Ass'n*, 863 F. Supp. 483, 488 (E.D. Mich. 1994), *rev'd on other grounds and dismissed in part*, 64 F.3d 1026 (6th Cir. 1995).

In this case, the district court, consistent with the holdings of numerous other courts, and consistent with the applicable statute and regulations, concluded Knapp is disabled under the Rehabilitation Act. By conducting an individualized inquiry and by examining the role of competitive athletics in the educational experience of students like Knapp, the district court correctly ruled that if Knapp's perceived medical condition caused him to be excluded from intercollegiate basketball, that ex-

clusion had caused Knapp to lose an essential and irreplaceable component of his major life activity of learning. App. F-4 to F-7.

The Seventh Circuit, without case law or statutory support, expressed its lack of regard for the importance of intercollegiate athletics by reversing the district court's decision (App. A-13 to A-14) on the ground that "learning through playing intercollegiate basketball is only one part of the education available to Knapp" and, as such, "Knapp's ability to learn is not substantially limited." This perspective radically understates and undervalues the importance of school athletics to the educational experience and is inconsistent with Congress' and other courts' view of the role of interscholastic and intercollegiate sports.

For many years, federal courts have held that athletics are not just important, but are an integral ingredient in a well-rounded curriculum. *See, e.g., Cape v. Tennessee Secondary Sch. Ath. Ass'n*, 424 F. Supp. 732, 743 (E.D. Tenn. 1976), *rev'd on other grounds*, 563 F.2d 793 (6th Cir. 1977); *Brenden v. Independent School District 742*, 477 F.2d 1292, 1298 (8th Cir. 1973) (interscholastic athletics found to be an integral facet of the education process). Similarly, by enacting laws like Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, Congress has recognized the essential nature of athletics to the activity of learning by requiring equal opportunities for women in school athletics programs.[12]

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[12] The evidence introduced at trial indicated that over the last decade, an average of approximately 3 million young men and women participate each year in organized high school and college athletics in the United States.

Further indicia that Congress intended intercollegiate athletics to be considered an integral part of the major life activity of learning is reflected by the regulations implementing the Rehabilitation Act promulgated by the Department of Health and Human Services and the Department of Education, both of which prohibit discrimination against otherwise qualified disabled persons in connection with intercollegiate athletics. *See* 34 C.F.R. § 104.47(a) and 45 C.F.R. § 84.47(a).

Moreover, it is undisputed that it is Northwestern's and the National Collegiate Athletic Association's express policy that intercollegiate athletics constitute an integral component of the higher education experience for the hundreds of thousands of college students like Knapp. As the district court found (App. F-5 to F-6), Knapp's own experience confirms the essential role interscholastic athletics have played and intercollegiate athletics would play in his major life activity of learning. The Seventh Circuit's decision conflicts with the view of almost every other court and commentary which has concluded that interscholastic or intercollegiate athletics constitute an essential element of the major life activity of learning and exclusion from them as a result of a permanent physical impairment (real or perceived) provides a basis for application of the Rehabilitation Act.[13]

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[13] See, e.g., *Sandison v. Michigan High School Athletic Ass'n, Inc.*, 863 F. Supp. 483, 488 (E.D. Mich. 1994) ("Because participation on the cross-country and track team is an important and integral part of the education of plaintiffs, it is as to them a major life activity"); *see also Poole v. South Plainfield Bd. of Education*, 490 F. Supp. 948, 954 (high school student with one-kidney unlawfully discriminated against under the Act by

(continued...)

The Seventh Circuit's comments (App. A-13 to A-14) that "the inability to play intercollegiate basketball at Northwestern forecloses only a small portion of [Knapp's] collegiate opportunities" and that (App. A-9 to A-10) many students obtain a diploma without having played intercollegiate athletics reflect not only a stereotypical bias against such activities, but also, and more important, do not answer the question of whether Northwestern's exclusion of Knapp is a substantial limitation of his "learning."

Not every student plays or is interested in participating in school-sponsored athletics. This, however, should not translate to a *per se* rule of law that exclusion of a person with a serious physical impairment from an athletic program can never constitute a substantial limita-

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[13] (...continued)
preclusion from interscholastic wrestling); *Wright v. Columbia University*, 520 F. Supp. 789, 793, 795 (E.D. Pa. 1981) (same for one-eyed plaintiff barred from playing intercollegiate football), *Grube v. Bethlehem Area School District*, 550 F. Supp. 418 (E.D. Pa. 1982) (high school student with one-kidney unlawfully discriminated against under the Act by preclusion from interscholastic football); Jones, "College Athletes: Illness or Injury and the Decision to Return to Play," 40 *Buff. L. Rev.* 113, 178-180 (1992) ("There can be little doubt that an athlete who has suffered a serious injury or illness and is precluded from playing because of that condition is an 'individual with [disabilities]' as defined by Section 504"); Mitten, "Sports Participation by 'Handicapped' Athletes," 10-SPG *Ent. & Sports Law* 15, 17 (1992) ("athletics constitutes a 'major life activity' for many people"); *but see Pahulu v. University of Kansas*, 897 F. Supp. 1387 (intercollegiate football is a major life activity because it is an integral part of a student-athlete's learning experience, but denial of participation does not constitute a substantial limitation of that activity).

tion of "learning." "It is the impaired individual that must be examined, and not just the impairment in the abstract." *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980).

Relying on the seminal case of *E.E. Black*, courts of appeal, including the Seventh Circuit, have consistently noted that a person's training and expectations are important factors for the finder of fact to consider in determining whether a physically impaired person is disabled. *See, e.g., Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959, 962 (7th Cir. 1996).[14] Applying these factors in this case, the trial court unequivocally found that Knapp's training and expectations established that his exclusion from Northwestern's basketball program would be a substantial deprivation of an integral and irreplaceable component of his major life activity of learning. App. F-4 to F-6.[15]

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[14] *See Huber v. Howard County, Maryland*, 849 F. Supp. 407, 412 (D. Md. 1994), *aff'd per curiam*, 56 F.3d 61 (4th Cir. 1995) (Plaintiff, with severe breathing problems, who trained to be firefighter for eight years by being volunteer firefighter, found to be disabled under the Act even if could have found jobs in other areas of employment); *Homeyer*, 91 F.3d 959 (plaintiff, a typist, has the right to show her ability to work as a typist in other downtown office buildings was substantially limited because of impairment).

[15] The Petition should also be granted because of the Seventh Circuit's finding that Knapp is not disabled because it is arguably possible that Knapp could attempt to attend and play basketball at another college and/or because he did not submit evidence that other schools view him as Northwestern does. App. A-13 to A-14 n.6. Northwestern does not suggest that Knapp's problem is that he cannot play only in its basketball arena; instead, it asserts that Knapp's condition bars him from

(continued...)

The Seventh Circuit's decision is incorrect because it now prevents the district court from conducting the individualized inquiry the law mandates. Instead, the Seventh Circuit's decision improperly issues a blanket rule of law that exclusion from intercollegiate athletics can never constitute a substantial limitation of a major life activity. The Seventh Circuit's rejection of the majority position on this issue requires this Court's review.

CONCLUSION

For the foregoing reasons, petitioner Nicholas Knapp respectfully requests that this Court grant his Petition for a Writ of Certiorari to resolve these important questions of federal law which impact upon a disabled person's right to seek the equal opportunity to participate in

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[15] (...continued)
playing for any school. Now, under the Seventh Circuit's analysis, the onus is now on the excluded plaintiff to establish that other federal grantees similarly misperceive him in order to establish disability. Such a result creates an automatic defense for any grantee who excludes a qualified individual based upon an improper perception of his condition because the possibility always exists that another grantee will not possess the same misperception. Such a result turns the Rehabilitation Act on its head and the Court should grant the Petition to insure that this conclusion will not be relied upon by other federal grantees to justify inappropriate exclusion.

those activities for which the individual is qualified to perform.

Respectfully submitted,

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